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No. 09-309

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

tw telecom of oregon llc,

Petitioner,

v.

City of Portland,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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RULE 29.6 STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I. The Court should review the Ninth Circuit's interpretation of Section 253 of the Telecommunications Act of 1996.

The Telecommunications Act of 1996 provides that no state or local regulation "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" (47 U.S.C. § 253(a)), reserving to the states and local governments the authority "to manage the public rights-of-way [and] to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis" (*id.* § 253(c)).

This case presents a violation of § 253 that is particularly egregious in its scope and consequence. Here, the City of Portland itself has entered the telecommunications business through its own competitive local exchange carrier ("CLEC"), which is named the Integrated Regional Network Enterprise ("IRNE"), and competes directly against private sector carriers. The City is using its municipal powers to favor its own CLEC's services. Thus, this is not simply a case where a municipality is deterring competition in general through excessive right-of-way fees for the benefit of the city treasury. Nor is this simply a case where the municipality has discriminated in its treatment among different private sector providers. Here, the City is acting in violation of § 253 for the benefit of *itself* in its role as a competitor with the private sector.

Specifically, the City has extracted fees and free communications facilities from other local carriers through its franchise ordinances. The City has done so without reference to the statutory requirement that any such consideration be fair and reasonable, and recovered on a competitively neutral and non-discriminatory basis. The City acts as a "resource aggregator" for IRNE, requiring other carriers to provide free conduit. The City then gives that conduit to IRNE so it can lower its costs for building its network, and obtain market share of governmental and educational business at the expense of competing carriers through lower prices. The City has also exempted IRNE from some of the franchise burdens that it imposes on other carriers, thus cementing IRNE's unfair and unlawful advantage.

A. The Ninth Circuit's construction of Section 253(a) creates a conflict among the Circuit Courts and raises significant legal issues

Respondent City of Portland argues that the Ninth Circuit's opinion neither creates a conflict among the circuit courts nor otherwise raises significant legal issues. Respondent's argument rests on a substantial misstatement of the record, of the Ninth Circuit's decision, and of the decisions of other circuits, and is without merit.

1. The Ninth Circuit opinion creates a split among the Circuits and is inconsistent with FCC precedent

The City's argument that the Ninth Circuit's opinion does not create a split among the circuits with regard to § 253 is based on what the City characterizes as an "ambiguous suggestion" in the opinion. City's Brief in Opposition, at 22. While the opinion is brief, there is nothing ambiguous about it. It shows that the court applied a test requiring a carrier to show that it could not operate in order to establish a violation of § 253(a). Petition, Appendix A, p. 3a-5a. There is no other way to read that language, and the City has not offered any alternative meaning that is tied to the language of the opinion and not pure fantasy on the City's part.

As discussed in the Petition, at pages 15-17, the test applied by the panel in this case is in direct conflict with the standard adopted by the First, Second, Eighth, and Tenth Circuits, each of which generally agrees with the FCC's decision in *In re California Payphone Ass'n*, 12 F.C.C.R. 14,191, 14,206, ¶ 31 (1997), that a local law "has the 'effect of prohibiting' the ability of any entity to provide" telecommunications if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.*, *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 15, 18 (1st Cir. 2006), *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67,76 (2d Cir. 2002), *cert. denied*, 538 U.S. 923 (2003), *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271 (10th Cir. 2004), *Level 3 Commc'ns, LLC v. City of St. Louis*, 477 F.3d 528, 533 (8th Cir. 2007), *cert. denied*, 128 S. Ct.

2859 (2009). This standard is different from the absolute exclusion that the Ninth Circuit requires.

The City's argument that the FCC's *In re California Payphone Ass'n* decision requires that the discriminatory fees materially affect the "economic viability" of TWTC's Portland operations[1] misstates the holding in that case. The FCC did not announce a test that says that in order to find that a local legal requirement "has the effect of prohibiting" the ability of any entity to provide any telecommunications service, the provider must show that the requirement materially affects the "economic viability" of its operations in the local jurisdiction. The test is as stated above: whether the requirement materially "inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *In re California Payphone Ass'n, supra*, 12 F.C.C.R. at 14,206, ¶ 31. The Ninth Circuit in this case adopted a test which makes it more difficult to assert a § 253 challenge, and which is out of line with other Circuits and the FCC's own position.

2. Petitioner raises issues beyond those rejected when this Court denied certiorari in *Sprint Telephony*

The City argues that this Court has already heard and rejected arguments that the decision in *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir 2008), *cert. denied*, 129 S. Ct. 2860 (2009), creates a split in the circuits and contradicts FCC

[1] City's Brief in Opposition, at 24.

precedent. But TWTC's argument is not that the *Sprint Telephony* decision creates a split among the circuits, but rather that the Ninth Circuit Panel's application of *Sprint Telephony* in this case creates such a split.

The *Sprint Telephony* court did not establish a standard for showing that a local requirement has the "effect of prohibiting" the provision of a telecommunications service. But the Ninth Circuit here did set such a standard, holding that a local action must completely prevent a carrier from operating before it runs afoul of § 253. That conclusion directly conflicts with the standard adopted in other circuits and with the standard announced by the FCC in *In re California Payphone Ass'n.*

B. Factual disputes regarding the impact of Portland's regulatory structure will be resolved by the lower courts after this Court states the proper legal standard

The City argues that this case is a poor vehicle to address the correct interpretation of § 253, on the ground that the City's ordinance had no adverse effect on petitioner. Therefore, respondent asserts, its ordinance would not be preempted under any of the competing interpretations of § 253. Again, the City misstates the record in this case, the legal test that the Ninth Circuit applied, and the legal conclusion that the Ninth Circuit drew from it. The Court of Appeals did not sustain the City's franchise ordinance on the premise that it had no effect on petitioner, but rather because the court avowedly read § 253 to require petitioner to make a very particular showing: TWTC, in

order to have standing, must show it was unable to operate (i.e., provide any services) in Portland as a result of the ordinance.

The City devotes much of its Brief in Opposition to an argument about what the District Court found and the conclusions it drew from the "undisputed evidence." In fact, the District Court's reading of the evidence, the inferences it drew from that evidence, and the construction it gave to § 253, were all riddled with error. But, ultimately, once this Court sets the proper legal standard, the trial court's rulings will be reviewed de novo by the appellate court. *See Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004).

It is what the Court of Appeals did in this case that is the key and the focus of TWTC's petition for writ of certiorari. And the Court of Appeals did not discuss or reach in any meaningful way the factual issues in this case, because it adopted a "bright-line" test that a carrier must be prevented from operating in the area covered by the challenged regulation in order to establish a case under § 253. For purposes of that test, the only relevant fact is that TWTC was not driven out of Portland by the franchise fees and in-kind requirements.

TWTC vigorously disputes the City's portrayal of the record below in many respects, including the following:

1. The City asserts TWTC operates successfully in Portland, which is one of TWTC's top ten

markets.[2] While Portland is in the top ten cities in terms of factors used to measure the performance of city managers, the evidence is that TWTC is not profitable in Portland.

2. The City claims TWTC was not harmed by IRNE's operation because in one case TWTC actually gained a new client when IRNE connected Portland schools to an "internet hotel."[3] The "new client" TWTC gained was a customer for internet access service, which IRNE doesn't provide. TWTC was effectively prohibited from providing the data transmission service from the school's location to the internet hotel, a service that IRNE does provide.

3. The City claims that IRNE's use of in-kind facilities does not harm TWTC because the value of those extracted facilities is only a small fraction of the City's total investments in IRNE, which is $11 million[4]. Comparing the cost of the extracted in-kind facilities to the $11 million the City spent on IRNE is not legitimate, because much of the $11 million relates to IRNE's provision of switched services to City bureaus, not to its provision of data transmission services, and those costs are not included in the costs

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[2] City's Brief in Opposition, at 17.

[3] City's Brief in Opposition, at 18, n.9; the "internet hotel" is a facility at which it is possible to connect with a number of internet service providers.

[4] City's Brief in Opposition, at 13-14.

IRNE considers in setting prices for services to third parties. Also, the City's witnesses admitted that the in-kind provisions allow it to "build IRNE at a fraction of the cost normally associated with such a project."[5]

4. The City argues that TWTC cannot complain about the in-kind contribution requirement in its franchise, because the City hasn't required any in-kind facilities from TWTC.[6] This fact is not significant. The obligation to provide free facilities to a competitor, who will use them to compete at lower prices, is such a deterrent to competition as to constitute an effective prohibition on providing service.

5. The City asserts that franchise fees need not be paid on INET revenues because the INET is part of a cable system and § 253 addresses regulation of telecommunications providers, not cable companies.[7] But the INET is a communications network, not a cable network, and INET services are telecommunications, not cable, services. See definitions of "cable service" (47 U.S.C. § 522(6)) and "telecommunications" (47 U.S.C. § 153(43)). Therefore, the revenue IRNE gets from selling INET services should be included in its calculation of gross revenues.

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[5] 8 QER (Olson Depo. I) at 86:16-22

[6] City's Brief in Opposition, at 23-24.

[7] City's Brief in Opposition, at 16.

6. The City argues TWTC cannot challenge IRNE's *use* of the in-kind facilities, because the City's use of its property is not a "legal requirement" that it imposes on carriers as part of its regulatory scheme and thus is not preempted by § 253(a).[8] The City is wrong. The reason why the City extracts free facilities from carriers — namely, to give IRNE a competitive advantage — is an integral part of the regulatory scheme that is subject to § 253(a).

While the City raises what it suggests are procedural hurdles, there are no impediments to review by this Court. First, neither lower court held that it was necessary to join every other carrier in order for TWTC to argue and prove that the City's overall scheme violated § 253(a). Second, the City questions whether the Ninth Circuit opinion even addressed TWTC's challenge to the in-kind contributions requirement. As noted in TWTC's Petition at p. 14, TWTC, Qwest Corporation, and Qwest Communications Corporation all broadly challenged their own franchises as well as the City's overall regulatory scheme, including the in-kind contribution requirements. In the absence of any other explanation, the Ninth Circuit's opinion can only be read as denying *all* of the § 253(a) challenges on the grounds that none of the carriers could show that it was prevented from operating in the market.

The City's view of the facts, including the extent to which its regulatory structure has impaired TWTC's profitability, and the extent to which the regulations are

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[8] City's Brief in Opposition, at 23-24.

discriminatory, are beyond the reach of TWTC's Petition. The Petition instead addresses the legal standards applied by the Ninth Circuit and the District Court. If the Ninth Circuit and District Court are directed to apply the proper legal standard, then these disputes regarding the contents of the record will be resolved there.

II. The Court should review the Ninth Circuit's determination that the Tax Injunction Act bars jurisdiction

A. The Tax Injunction Act should not be applied to thwart federal telecommunications policy

If, as a result of this case, the Tax Injunction Act (28 U.S.C. § 1341) trumps § 253 of the Telecom Act, then state and local governments will be able to discriminate in favor of preferred telecommunications providers, so long as that discrimination takes the form of a fee for use of rights-of-way rather than some other type of "statute or regulation or other . . . legal requirement." 47 U.S.C. § 253(a). The policy of open competition in telecommunications services will be meaningless if federal courts are stripped of jurisdiction to prevent discriminatory franchise fees.

The Congressional Record supports that the Telecom Act is a "very, very broad prohibition against State and local" regulation of telecommunications companies.[9] To facilitate competition, Congress "has

[9] 141 Cong. Rec. S8212 (daily ed. 6/13/1995) (Comments of Sen. Gorton).

taken the regulation of local telecommunications competition away from the States [and local governments]." *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378, n. 6 (1999).

Congress has thus determined that it is necessary for the federal government to intrude in state regulation of telecommunications providers, including by requiring that "compensation . . . for use of public rights-of-way" be imposed "on a nondiscriminatory basis." 47 U.S.C. § 253(c). To call such compensation a "tax" — which is not subject to review in federal court by virtue of the TIA — is to thwart the intention of Congress in enacting the Telecom Act.

B. If franchise fees are "taxes," Section 601 of the Telecom Act eliminates a state court forum

The City of Portland argues that, if its franchise fees are taxes and the federal courts lack jurisdiction, then TWTC can go to state court to vindicate its rights. City's Brief in Opposition, at 35. That is the result contemplated by the TIA if a "plain, speedy and efficient remedy" exists in state court. 28 U.S.C. § 1341. But the Telecom Act expressly does not "modify, impair or supersede . . . any State or local law pertaining to taxation." Telecom Act, §601(c)(2), 110 Stat. 143, codified at note to 47 U.S.C. § 152. So if the franchise fees are taxes, a state court would be unable to apply the Telecom Act to enforce the intent of Congress to facilitate competition among telecommunications providers. As a consequence, there is no "plain, speedy and efficient remedy" in state court, and the TIA should not bar federal court jurisdiction.

C. Barring enforcement of the Telecom Act does not advance the purpose of the TIA

This case does not fit the mold of cases that Congress intended to exclude from federal courts. This Court stated in *Jefferson County v. Acker*, 527 U.S. 423, 435 (1999), that, in enacting the TIA, "Congress, it appears, sought particularly to stop out-of-state corporations from using diversity jurisdiction to gain injunctive relief against a state tax in federal court, an advantage unavailable to in-state taxpayers denied anticipatory relief under state law."

That policy might be implicated here if TWTC were challenging Portland's franchise fees based on a *state law* claim. As an example, two of the cases the City cites for the rule that the TIA bars an attack on franchise fees were, in fact, diversity jurisdiction challenges based on state law. *Keleher v. New England Tel. & Tel. Co.*, 947 F.2d 547, *abrogated on other grounds, Jefferson County v. Acker*, 527 U.S. 423 (1999), *Independent Coin Payphone Ass'n v. City of Chicago*, 863 F. Supp. 744 (N.D. Ill. 1994) (City's Brief in Opposition, at 31). But TWTC has sued based on federal question jurisdiction, and seeks to vindicate a *federal right*. Allowing the City of Portland to override the Telecom Act and impose discriminatory rights-of-way fees without review by a federal court does not advance the purpose of the TIA.

TWTC notes, finally, that the Court earlier this month granted certiorari in a case concerning the TIA, *Levin v. Commerce Energy, Inc.*, No. 09-223 (Petition for Certiorari Granted November 2, 2009). That case – in which it is undisputed that the assessment is a tax –

addresses the role of the federal courts in the administration of state taxation systems.

III. TWTC Requests that the Court invite participation by the Solicitor General

TWTC respectfully requests that the Court invite the Solicitor General to file a brief expressing the views of the United States on these critical issues of telecommunications policy.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, TWTC respectfully requests that the Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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